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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1979

No. 79-6672

ORIGINAL COPY

KERRY DALE CASEY,

Appellant,

v.

ALLEN AULT, Executive Director,
Colorado Department of Corrections,

Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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Pursuant to Supreme Court Rule 16, the appellee requests that this appeal be dismissed, or that the judgment of the United States Court of Appeals for the Tenth Circuit be summarily affirmed.

In support of these motions, the appellee states that:

1) Dismissal of the appeal is required because the decision below affirmed the denial of a federal habeas-corpus petition following the defendant-appellant's conviction of first-degree murder in the Colorado state courts. The defendant-appellant had sought habeas-corpus relief on the basis that an allegedly erroneous instruction defining included

offenses had denied him due process of law. The federal courts rejected this argument without determining any Colorado statute to be "invalid as repugnant to the constitution, treaties, or laws of the United States." Such a determination of repugnancy is the basis for appellate jurisdiction pursuant to 28 U.S.C. 1254(2), cited by the defendant-appellant as the instant basis for jurisdiction.

This court is not required to review this matter on appeal. Habeas-corpus questions are reviewable on certiorari rather than on appeal. E.g., Ex parte Quirin, 317 U.S. 1 (1942).

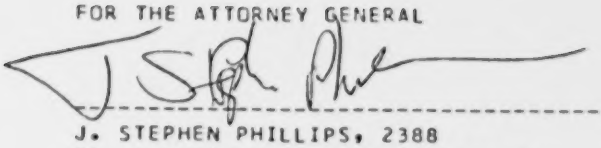
2) Alternatively, summary affirmance of the judgment is appropriate because the questions on which the decision of the cause depends are so insubstantial as not to need further argument. As set forth in the opinion of the Court of Appeals for the Tenth Circuit, appended to the appellant's jurisdictional statement, two issues were decided by that court, both on the basis of well-established precedent:

A) The challenged instruction did not violate the defendant's due-process rights. See Cupp v. Naughten, 414 U.S. 141 (1973).

B) A state is not required to apply a rule of law retroactively. Wainwright v. Stone, 414 U.S. 21 (1973).

For these reasons, the appeal should be dismissed or the judgment of the Tenth Circuit Court of Appeals should be affirmed.

FOR THE ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within MOTION TO DISMISS OR AFFIRM upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 26th day of June 1980, addressed as follows:

Gene Beville
1220 Monaco Parkway
Denver, Colorado 80220

Ellen Kersten

AG File No. BLI/CASEY/C